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No. 90-729

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
Petitioner,

v.

MADELINE MONTANO,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a showing of simple negligence by a union in handling a contract grievance is sufficient to establish a breach of the union's duty of fair representation?

2. If a union may be found to have breached its fair representation duty by simple negligence in handling a discharge grievance, in a situation in which the union's mistake does not prevent arbitration of the grievance or provide the employer reason to believe the grievance is finally settled, is the union liable for any portion of the back pay damages caused by the employer's wrongful discharge? *

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* In addition to the parties shown in the above caption, the Pacific Northwest Bell Telephone Company, a wholly owned subsidiary of U.S. West, Inc., was a defendant in the district court. This corporate defendant was dismissed in an earlier appeal, and did not participate in the second appeal.

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PETITION FOR A WRIT OF CERTIORARI

The Communications Workers of America, AFL-CIO, hereby petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Montano v. Communications Workers of America*, 9th Cir., No. 89-35074 (May 1, 1990).

OPINIONS BELOW

The court of appeals' Memorandum Opinion of May 1, 1990 is reproduced in the Appendix ("App.") to this petition at pp. 1a-4a. The district court's Order and Judgment of December 19, 1988 is reproduced at App. 5a-14a. The district court's Memorandum and Order of October 13, 1987 is reproduced at App. 15a-19a. The

court of appeals' Memorandum Opinion of March 23, 1987 is reproduced at App. 20a-22a. The district court's Memorandum and Order of February 14, 1986 is reproduced at App. 23a-30a. The district court's Memorandum Decision of August 10, 1984 is reproduced at App. 31a-44a. None of these opinions is reported.

JURISDICTION

The decision of the court of appeals was rendered on May 1, 1990. App. 1a. A timely petition for rehearing was denied on July 9, 1990. App. 45a-46a. Justice O'Connor signed an order extending the time for filing this petition to and including November 6, 1990. App. 47a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Proceedings Below.

This is a hybrid suit alleging an employer breach of contract under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and a union breach of the duty of fair representation under the National Labor Relations Act, as amended, 29 U.S.C. § 159. The district court had jurisdiction over these claims under 28 U.S.C. §§ 1331 and 1337.

The district court initially found both an employer breach of contract and a union breach of the fair representation duty and awarded damages against both the employer and the union defendants. App. 44a. On a prior appeal, the court of appeals reversed the judgment against the employer defendant and remanded the case for calculation of the union defendant's share of damages. App. 22a. The district court's judgment against the union defendant on remand was entered on December 19, 1988. App. 14a. On May 1, 1990, the court of appeals affirmed the district court's judgment in part, and remanded for a recalculation of certain elements of damages. App. 4a.

B. Statement of Facts.

The plaintiff, Madeline Montano, was discharged from employment at the Pacific Northwest Bell Telephone Company ("PNB") in May 1977, when she failed to return from disability leave as directed by the Company. App. 23a-24a. Ms. Montano's union, the Communications Workers of America ("CWA"), filed a grievance challenging her discharge as a violation of the Union's collective bargaining agreement with PNB. The Union processed the grievance through all the steps of the contractual procedure without success. App. 24a.

The Company representative verbally denied Ms. Montano's grievance at a meeting on October 6, 1977, and on October 25, 1977 CWA received the Company's written denial. App. 24a. CWA then requested arbitration on November 29, 1977. App. 24a. PNB refused arbitration, asserting that the Union's request was not made within the contractual time limits. App. 25a.

CWA and PNB went to arbitration over the timeliness of the Union's demand to arbitrate Ms. Montano's discharge, reserving the merits of her grievance for later determination. App. 25a. Taking what the district court characterized as a "somewhat technical approach," App. 29a, the arbitrator accepted PNB's argument that the time limit on requesting arbitration began to run on the Company's verbal denial of the grievance rather than, as the Union believed, on the Company's written denial. On this basis the arbitrator ruled that the Union's request for arbitration was untimely. App. 25a.

The arbitrator rendered his decision denying the grievance in April 1979, and one year later, in May 1980, Ms. Montano sued CWA for breach of the duty of fair representation. A year and a half after that, in the fall of 1981, Ms. Montano joined PNB as a defendant. App. 22a.

After a trial on the merits, the district court issued a decision on August 10, 1984, finding that PNB had

breached the collective bargaining agreement by discharging Ms. Montano and that CWA had breach its duty of fair representation by missing the time limit in requesting arbitration of her discharge. App. 37a-42a. With respect to the Union's alleged breach, the district court found: "The record reflects no hint of hostility, bad faith or discriminatory intent in CWA's handling of Montano's grievance. The union was, however, negligent." App. 37a. Following the Ninth Circuit's decision in *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270 (9th Cir. 1983), the district court concluded that the Union had breached its duty of fair representation by an act of "simple negligence" in missing the time limit on demanding arbitration. App. 38a.[1]

All parties appealed from the district court's first judgment. The court of appeals affirmed the district court's conclusion that CWA had breached its duty of fair representation. App. 21a. With respect to the fair representation issue, the appellate court's opinion stated that "[t]he trial judge properly applied the test set forth in *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1274 (9th Cir. 1983)," in finding that the Union's "simple negligence" had breached the fair representation duty. App. 21a. The appellate court also ruled that Ms. Montano had not joined PNB as a defendant in a timely fashion, and that the Company should be dismissed from the suit. App. 22a. The court of appeals remanded the case to the district court to apportion damages. *Id.*

On remand, the district court determined that CWA was liable for all of Ms. Montano's lost pension benefits and for all of her lost wages, except for those wages attributable to the first fifteen months after her discharge. App. 11a-14a. The Union appealed, specifically preserving the liability issue decided on the prior appeal. Brief for Appellant Communications Workers of America, 9th Cir.

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[1] PNB reinstated Ms. Montano to employment on October 8, 1984, and she voluntarily resigned on August 29, 1985. Dk. Nr. 176.

No. 89-35074, p. 9 n. 6 (filed June 30, 1989). In a memorandum opinion dated May 1, 1990, the court of appeals affirmed the district court's apportionment of liability for lost wages, reduced the Union's liability for lost pension benefits by fifteen months, and corrected an arithmetic error in the second judgment. App. 4a. The appellate court remanded the case to the district court with directions to enter a money judgment in favor of Ms. Montano according to a formula described in the court of appeals' opinion.

The Union filed a timely petition for rehearing, which was denied by the court of appeals. App. 45a-46a.

REASONS FOR GRANTING THE WRIT

I. SIMPLE NEGLIGENCE BY A UNION IN PROCESSING A GRIEVANCE DOES NOT BREACH THE DUTY OF FAIR REPRESENTATION.

In this case, the Ninth Circuit adhered to its line of precedent holding that "merely negligent conduct" in a union's "failure to perform a ministerial act required to carry out [its] decision" to prosecute a grievance may be the basis for fair representation liability that begins in *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1273 (9th Cir. 1983). *See* App. 21a.

Dutrisac's delineation of the scope of the duty of fair representation, as we show below, is in direct conflict with this Court's ruling in *Steelworkers v. Rawson*, —— U.S. ——, 110 S.Ct. 1904, 1911 (1990), that "mere negligence, even in the enforcement of a collective-bargaining agreement, would *not* state a claim for breach of the duty of fair representation. . . ." (Emphasis added.)

Beyond that, the question of the scope of a union's fair representation duty in handling grievances is a constantly recurring one and the Ninth Circuit's answer to that question is in direct conflict with the law in the Seventh Circuit. Correctly anticipating *Rawson*, the Seventh Cir-

cuit has held that negligence is not a sufficient basis for a fair representation claim. *See Hoffman v. Lonza, Inc.*, 658 F.2d 519, 522-523 (7th Cir. 1981). In addition, while the relevant law in the Third Circuit is not as clear as in the Seventh Circuit, we believe that the *Dutrisac* rule is in conflict with the Third Circuit's law as well. *See Riley v. Letter Carriers Local No. 380*, 668 F.2d 224, 228-229 (3d Cir. 1981) (union negligence causing employee's contract claim to become time barred does not breach the fair representation duty). Further, the First, Second, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits have all addressed the question presented here with results that span the spectrum between the polar positions stated by the Ninth Circuit and the Seventh and Third Circuits.[2]

Against this background, we submit that the interest in assuring the uniformity of federal law in this important area calls for summary reversal of the decision below on the authority of *Steelworkers v. Rawson, supra.*

Alternatively, we suggest that this *certiorari* petition should be held pending decision in *Air Line Pilots Ass'n v. O'Neill*, Sup. Ct. No. 89-1493, *certiorari* granted October 1, 1990, since the *Air Line Pilots* case raises a related question as to the scope of the fair representation duty.

Finally, while in our view the *Dutrisac* rule cannot stand after this Court's *Rawson* opinion, if we are wrong

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[2] For recent representative examples see *Early v. Eastern Transfer*, 699 F.2d 552, 556-557 (1st Cir.), *cert. denied*, 464 U.S. 824 (1983); *Young v. U.S. Postal Service*, 907 F.2d 305, 308 (2d Cir. 1990); *Smith v. Local 7898, Steelworkers*, 834 F.2d 93, 96-97 (4th Cir. 1987); *Landry v. The Cooper/T. Smith Stevedoring Co.*, 880 F.2d 846, 852-854 (5th Cir. 1989); *Allen v. Allied Plant Maintenance Co.*, 881 F.2d 291, 297 (6th Cir. 1989); *Stevens v. Highway, City & Air Freight Drivers*, 794 F.2d 376, 377-379 (8th Cir. 1986); *Foust v. Int'l Broth. of Electrical Workers*, 572 F.2d 710, 715-716 (10th Cir. 1978), *rev'd on other grounds*, 442 U.S. 42 (1979); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1521 (11th Cir. 1988), *cert. denied*, —— U.S. ——, 109 S.Ct. 2066 (1989).

in that regard and if there is still law to be made on the role of negligence concepts in a fair representation suit challenging a union's handling of a grievance, given the manifest, longstanding conflict in the circuits, this petition should be granted and the case set down for plenary consideration.

A. The Ninth Circuit distinguishes "an erroneous decision by the union" from "its failure to perform a ministerial act required to carry out the decision. . . ." *Dutrisac v. Caterpillar Tractor Co., supra*, 749 F.2d at 1273. While the Ninth Circuit "accord[s] substantial deference to the union's decisions," with respect to a "failure to perform ministerial acts," that court has concluded that "judicial deference to the union serves no purpose," and therefore it is "more willing to impose liability for merely negligent conduct" involving such failings. *Id.*

Thus, in order to select the correct legal standard by which to adjudicate a fair representation claim, courts in the Ninth Circuit must first determine whether the challenged union conduct involves a "decision" or a "ministerial act." Further complicating the judicial inquiry, *Dutrisac* limits the imposition of liability for union negligence in carrying out a ministerial act "to cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." 749 F.2d at 1273.

The Ninth Circuit has recently acknowledged that under its approach the "precise contours" of the fair representation duty "have proved difficult for us to delineate" in large part because "differentiating a ministerial task from a judgment call is not always easily accomplished." *Peters v. Burlington Northern Railroad*, —— F.2d ——, 135 LRRM 2585, 2588 & 2589 (9th Cir., Sept. 18, 1990), *pet. for rehearing pending*. Because the Ninth Circuit's approach sets up "a continuum that broadly attempts to separate discretionary decision making from inexplicable conduct," and "obligates [courts] to evaluate the strength

of the employee's grievance," its effect is to require a far-reaching case-by-case inquiry into the adequacy of the union's grievance handling efforts and the merits of the underlying grievance. *Id.* at 2590.

The difficulty of "differentiating a ministerial task from a judgment call" is demonstrated by the facts of this case. The CWA representative handling Ms. Montano's grievance did not forget to demand arbitration or otherwise carelessly miss the time limit. Rather, he made a reasoned determination that the grievance was finally denied—and the time for requesting arbitration began to run—upon receipt of the Company's written denial. App. 24a-25a. The arbitrator—in what the district court characterized as a "somewhat technical approach," App. 29a—ruled that the time for requesting arbitration began to run earlier when the Company verbally denied the grievance at a meeting, App. 25a. Clearly, the union representative was making a "decision" about how to handle the grievance, but since, in the view of the courts below, this was a decision about when to take a "ministerial act" the Ninth Circuit imposed liability for "simple negligence." App. 21a.[3]

[3] The problem is identifying what is a final decision for purposes of calculating the time to appeal is inherent in any system that allows for such appeals but places time limits on their filing. *Compare Federal Trade Comm'n v. Minneapolis-Honeywell R. Co.*, 344 U.S. 206, 210-211 (1952), *with United States v. Adams*, 383 U.S. 39, 41-42 (1966). Nonetheless, the district court faulted CWA for not designing a grievance system that avoids such problems. App. 28a-29a. That assessment of blame is unfair on two grounds. Designing a particular method of handling grievances is surely nearer to the "discretionary decision" end of the "continuum" defined by the Ninth Circuit than to its "inexplicable conduct" end. *Peters v. Burlington Northern Railroad*, *supra*, 135 LRRM at 2590. Thus, even if it were proper to characterize as negligent the Union's failure to anticipate and foreclose a problem that has plagued the federal courts, that would not constitute a breach of the fair representation duty. Moreover, the district court ignores altogether the fact that the Union does not act alone in framing the grievance procedure, the Union must get the employer's agreement to any

B. The Ninth Circuit's fair representation standard cannot be squared with this Court's recent decision in *Steelworkers v. Rawson*, —— U.S. ——, 110 S.Ct. 1904 (1990).

Rawson involved an action brought on behalf of the survivors of miners who died in a mine accident. The underlying theory of the complaint was that the union was negligent in carrying out its duty to inspect the mine pursuant to the safety clause of its collective bargaining agreement. 110 S.Ct. at 1907. After holding that the plaintiffs' state law negligence claims were preempted by federal law, the Court went on to accept the union's argument that "the case against [the union] may not go forward even under federal law . . . [because] *it is charged with only negligence, which is insufficient to prove a breach of its duty of fair representation.*" *Id.* at 1911 (emphasis added). *See also id.* at 1916-17 (Kennedy, J., dissenting) (agreeing with the majority opinion on this point).

In every legally relevant respect, *Rawson* is identical to this case. The alleged failing in *Rawson* involved, to use the terms of the courts below, a "ministerial, not interpretative function," App. 21a, *viz.*, "inadequately train[ing]" members of the safety committee and "negligently perform[ing] inspections of the mine that it had promised to conduct. . . ." 110 S.Ct. at 1907. And, to again borrow the district court's words in this case, the "stakes" in *Rawson* could not have been "high[er]," App. 21a, as 91 miners lost their lives due to the alleged failure of the union's inspectors to "uncover obvious and discoverable deficiencies." 110 S.Ct. at 1907. Nor can the instant case be distinguished from *Rawson* on the

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system it might propose. "[F]reedom of contract" is one of the National Labor Relations Act's "fundamental policies." *H.K. Porter Co. v. NLRB*,, 397 U.S. 99, 108 (1970). The duty of fair representation, implied from that Act, does not override this principle by granting the federal district courts the authority to design contractual grievance-arbitration procedures.

grounds that CWA's breach was its alleged failure to "maintain a more effective system of keeping track of the timing of grievances." App. 29a. The *Rawson* plaintiffs alleged a similar systemic failure by the union defendant in that case, *viz.*, "inadequately train[ing]" members of the mine safety committee, so that they could not "uncover obvious and discoverable deficiencies." 110 S.Ct. at 1907.[4]

The Ninth Circuit nonetheless refuses to recognize *Rawson*'s definition of the scope of the fair representation duty. The Union's petition for rehearing in this case relying on *Rawson* was denied. Moreover, in *Peters v. Burlington Northern Railroad*, *supra*, the Ninth Circuit undertook a comprehensive review of its fair representation rulings, noted the *Rawson* decision, and then went on to reaffirm that simple negligence in the handling of a grievance is actionable. 135 LRRM at 2589-90. This refusal to conform the Ninth Circuit's fair representation law to this Court's law warrants exercise of the Court's supervisory power over the lower federal courts.

C. The Seventh Circuit, in contrast to the Ninth Circuit, has "adopt[ed] a standard based on prohibited intent because any other approach would embroil the courts in the merits of employment decisions." *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242, 244 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986). The Seventh Circuit has concluded that requiring judicial inquiry into the merits

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[4] As we have noted, the district court acknowledged that the CWA representative's "failure to know when plaintiff's grievance was finally denied was understandable," but that it was the Union's "totally unjustified and inexcusable failure to provide a workable method for ascertaining when a grievance has been denied which forms the basis for my decision that the union's conduct was arbitrary." App. 28a. However, as we have also explained, *supra* p. 8 n.3, the Union's failure to design and bargain for a grievance system that foreclosed such problems cannot be characterized as "negligence" in the performance of a "ministerial act," without so distorting those terms as to deprive both of meaning.

of a grievance, as the Ninth Circuit fair representation precedents do, would unwisely "move the locus of decision from the grievance-arbitration process to the courts" and thereby "both violate the contractual allocation of decisionmaking power and undermine the national policy favoring nonjudicial disposition of labor disputes." *Id.* at 244.

The Seventh Circuit further notes that "[t]he use of a standard based on causation or negligence also would interfere with employees' right to choose the level of care for which they are willing to pay." 786 F.2d at 244. As that court explains, the quality of union performance in the handling of grievances is ultimately a matter of how much the union chooses to invest in that function. "A union may choose to rely on part-time, untrained, overworked grievers—with the inevitable difference in the outcome of some cases—rather than purchase a higher quality of representation." *Id.* at 245. A fair representation standard requiring a certain "quality of representation" inevitably "would compel unions to change the allocation of their resources" and thus "undercut employees' rights to control their own destiny. . . ." *Id.*[5]

The Seventh Circuit, moreover, does not stand alone in this regard. While the Third Circuit law is not as crystal clear as that of the Seventh Circuit, the Third Circuit, too, has rejected the *Dutrisac* approach, as we show in the margin.[6] And, eight of the remaining nine Courts of Ap-

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[5] The Ninth Circuit's difficulty in distinguishing union "decisions" from "ministerial acts" in this case and in *Peters* confirms the Seventh Circuit's point that a fair representation standard based on negligence inevitably results in deep judicial involvement in the most mundane aspects of the contractual grievance procedure. See pp. 7-8, *supra*.

[6] In *Riley v. Letter Carriers Local No. 380*, 668 F.2d 224 (3d Cir. 1981), the Third Circuit considered a claim that a union representative's "possibly negligent" conduct caused an employee's contract claim to become time-barred. *Id.* at 230 n.12. The union representative's alleged negligence was in failing to recognize that two

peals have addressed the question presented here without a uniform response. See p. 6 n.2, *supra.*

In sum, if the decision below is not summarily reversed and remanded for reconsideration in light of *Rawson*, and this petition is not held pending decision in *Air Line Pilots Ass'n v. O'Neill*, the Court should give plenary consideration to this case in order to resolve the circuit conflict over the correct standard to be applied to fair representation claims that challenge a union's handling of a grievance.

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letters from the employer constituted a breach of an agreement to hold a grievance in abeyance, and as a result failing to re-activate the grievance in a timely fashion. *Id.* at 228. While the court found that the union representative's "actions were certainly mistaken, and possibly negligent," it also concluded that such allegations did not state a claim for breach of the fair representation duty. *Id.* at 229. The union's failure in *Riley* was in carrying out what the Ninth Circuit would characterize as a "ministerial act"—re-activating a grievance that had been held in abeyance—but the Third Circuit held that even with respect to such ministerial acts "mere negligence does not constitute a breach of the duty of fair representation." *Id.* at 230 n.12. The Third Circuit's decision in *Riley* is in direct conflict with the Ninth Circuit's decisions in this case and in *Dutrisac*, but at the same time the Third Circuit has not committed itself to the Seventh Circuit's rule that discriminatory intent must be shown to establish a fair representation breach. *Compare Medlin v. Boeing Vertol Co.*, 620 F.2d 957, 961 (3d Cir. 1980) ("To violate the duty, however, it is necessary that union act with a bad faith motive."), *with Findley v. Jones Motor Freight*, 639 F.2d 953, 959 (3d Cir. 1981) ("The perimeters of the minimally acceptable conduct [by a union in processing a grievance] cannot be too lax. . . .").

II. IF A UNION'S ACT OF SIMPLE NEGLIGENCE IS SUFFICIENT TO ESTABLISH A BREACH OF THE FAIR REPRESENTATION DUTY, THE UNION SHOULD NOT BE LIABLE FOR ANY PORTION OF THE BACK PAY DAMAGES CAUSED BY THE EMPLOYER'S BREACH OF CONTRACT WHERE THE UNION'S MISTAKE HAS NOT PREVENTED ARBITRATION OR PROVIDED THE EMPLOYER REASON TO BELIEVE THE GRIEVANCE HAS BEEN FINALLY SETTLED.

The Ninth Circuit compounded its error on the substantive law that applies here by reaching an equally erroneous result on the rule governing the apportionment of backpay liability between employers and unions in hybrid 301/fair representation cases. By so doing, the court below provided a second, independent basis for reviewing this case.

As this Court recognized in *Bowen v. U.S. Postal Service*, 459 U.S. 212 (1983), the correct apportionment of damages in hybrid cases involves a careful consideration of federal labor policy as well as the balance of equities between employer and union defendants. In this case, the courts below completely ignored these considerations, and drew a simple-minded identity between cases such as this where the union attempted to redress the employer's contract breach in arbitration, but was prevented from doing so by the fact that the employer seized upon a procedural mistake to prevent an arbitration the union sought, and cases like *Bowen* where the union refused to challenge the contract breach in arbitration.

The judgment in this case imposes backpay liability on the Union that is six times the amount allocated to the Company. This disproportionate liability is placed on the Union even though it was the *Company's* wrongful discharge of Ms. Montano that precipitated the entire dispute and even though the Union did nothing that prevented the resolution of the dispute through the

grievance-arbitration procedure. This result is contrary to this Court's teachings in *Bowen*.

In *Bowen*, "the union had breached its duty of fair representation *by refusing* to take [the employee's] claim to arbitration." 459 U.S. at 220 (emphasis added). This refusal was the basis for shifting a portion of the back pay liability to the union, because "[t]he employer may have done nothing to prevent exhaustion [of the grievance/arbitration procedure]," *id.* at 222, and in such a situation it would be "unjust to require the employer to bear the increase in the damages caused by the union's wrongful conduct" in refusing to seek arbitration, *id.* at 223 (footnote omitted). "[T]he union . . . assumes the responsibility of determining whether to press an employee's claims," and the employer generally "must rely on the union's decision not to pursue an employee's grievance." *Id.* at 225.

In this case, by contrast, CWA insisted on arbitration, but resolution of the grievance was thwarted by the employer's refusal to arbitrate, relying on a technical defense. Thus, it cannot be said that PNB "rel[ied] on the unions' decision not to pursue an employee's grievance." 459 U.S. at 225. In these circumstances, allocating back pay liabiilty to the Union is contrary to the "governing principle" that "damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer." *Id.* at 214.

Where the union has not refused to proceed to arbitration or otherwise given the employer reason to believe that a grievance has been finally settled, a union mistake that allows the employer to avoid early resolution of the grievance through arbitration *cannot* be said to cause the increased damages due to the delay in settling the dispute through litigation.

While the result here is inequitable in the extreme, that is only the beginning of the mischief the decision below works. Under the damage allocation rule applied by the courts below, employers have *no* incentive to comply with union demands for arbitration where there is any hope of reaching for a technicality to frustrate the arbitration process. This is so, because under that rule the employer's damages, should the employee bring a successful hybrid suit, *are not one cent more* than the arbitration award would have been had the union been allowed to arbitrate the employee's grievance. Indeed, the employer is encouraged to resist arbitration by the hope that the employee will make a procedural mistake in filing suit that will allow the employer off altogether, as happened here. This result is contrary to the federal policy of encouraging private resolution of labor disputes, and it is most unfair to the union, which is unable by itself to do anything to resolve the dispute.

The damage allocation rule applied by the Ninth Circuit in this case, by encouraging employers to resist arbitration on procedural grounds, exacerbates the adverse consequences of the substantive fair representation standard articulated by that court. If this case is not summarily reversed on the basis of *Steelworkers v. Rawson*, *supra*, the Court should review both of these aspects of the decision below.

CONCLUSION

The petition for *certiorari* should be granted.

Respectfully submitted,

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